

Exhibit 7

1

CBKAAMOOC Conference

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 DASILVA MOORE,

3
4 Plaintiff,

4
5 v.

11 CV 1279 (AJP)

5
6 PUBLICIS GROUPE,

6
7 Defendant.

7
8 -----x

New York, N.Y.
November 20, 2012
9:30 a.m.

9
10 Before:

10
11 HON. ANDREW J. PECK,

11
12 Magistrate Judge

12
13 APPEARANCES

14
15 SANFORD HEISLER, LLP
16 Attorneys for Plaintiff
17 BY: SUSAN RUBENSTEIN

18
19 SANFORD WITTELS & HEISLER
20 Attorneys for Plaintiff
21 BY: SIHAM NURHUSSEIN
22 DEEPIKA BAINS

23
24 JACKSON LEWIS LLP
25 Attorneys for Defendant
BY: VICTORIA WOODIN CHAVEY
BRETT M. ANDERS

Also present: Dave Lewis, Ph.D.
Douglas Forrest, ILS

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

CBKAAMOOC Conference

1 (Case called)

2 THE COURT: Be seated. All right. Welcome back.
3 It's been a long time.

4 And I guess, Ms. Rubenstein, you are the newest member
5 of the plaintiff's team. Welcome aboard.

6 MS. RUBENSTEIN: Good morning. Nice to meet you.

7 THE COURT: I am hopeful despite the size of the
8 letters and attachments you each gave me that, perhaps, things
9 can move more cooperatively with each other and with the Court
10 going forward. I am glad to see you've reached certain
11 agreements. You, obviously, haven't agreed on everything.
12 That's too much to hope for in any case but, certainly, in this
13 one.

14 Here's my biggest concern in looking at what you've
15 put before me and then we'll go through some of the other
16 issues in great detail. As the counsel who have been here from
17 the beginning know, this idea of not doing class certification
18 until after all discovery has been something that I have been
19 unhappy with since I took this case over from Judge Sullivan or
20 whoever was the initial -- yes, Judge Sullivan. And I was
21 unable to convince plaintiffs to do anything about that. Your
22 current papers seem to be saying well, we should have Title VII
23 related discovery for all the opt-ins even though they don't
24 have a Title VII claim because, well, they're going to be part
25 of the class. And in addition to that, we're going to have to

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 do more Title VII discovery a second time around. This is
2 expensive enough and has taken up more than this case's share
3 of judicial resources and I don't want to do that. So, it's a
4 purported class.

5 Either there is class related discovery, not
6 individual plaintiff discovery that can go on now to establish
7 whether there is a common policy practice, whatever, that makes
8 what happened to everybody who worked for MSL appropriate or
9 there isn't. Or we're going to do limited discovery only as to
10 class issues and then have a class certification motion and I
11 am willing to listen to all of you or send you all away and
12 have you come back after you think about it but considering how
13 much money has already been spent, how many motions or
14 objections, whatever conferences both Judge Carter and I have
15 dealt with, I really do not want to go through this period
16 however we adjust it and then have you say, OK, then we're
17 going to do it all over again.

18 So, Ms. Rubenstein, if you have any thoughts on that
19 as you stand here --

20 MS. RUBENSTEIN: Thank you, your Honor.

21 We absolutely do and we welcome the Court's comments
22 because at least from where we sit we completely agree with
23 them. I am new to the case but having just entered the case at
24 a time when we now have 26 new named parties, you can see what
25 a nightmare it's become to try to figure out a way with which

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 we can avail ourselves -- predictive coding without having to
2 go back and revamp and start over and over and over again which
3 is why we brought Dr. Lewis and Doug Forrest with us today
4 because they can speak to the subject in a far more fluent
5 manner than I can.

6 But having said all that have, yes, I concur with the
7 Court's opinion. It is a situation where irrespective of
8 whether our class is going to be certified or not, there will
9 be a sizable number of additional named plaintiffs, all of whom
10 will be wanting and entitled to see discovery.

11 THE COURT: OK. But there are two separate issues, so
12 let me just interrupt you there. If the opt-ins want to bring
13 individual claims, you know if the time hasn't also passed, now
14 is the time to do it. What you've said in your letters in
15 front of me is sort of they may, they probably will, they
16 might, you know, whatever. We're not doing it that way. So I
17 see that as one issue. If those 26 minus, plus or minus the
18 ones who are disputed but if they are going to assert claims
19 and subject to whatever defendants have to say and whatever
20 reminder there may be, that it's too late under a case
21 management order or whatever but if they're going do a claim,
22 let's do it before we start going through document discovery
23 again. But I'd really rather address directly the class issue.

24 MS. RUBENSTEIN: Well, as my colleague just pointed
25 out, what we are talking here and we're anticipating, your

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 Honor, is that there will be far more plaintiffs than 26.
2 There will be, you know --

3 THE COURT: I am sorry. Then I am missing something.
4 How will there be more plaintiffs other than that there'll be
5 members of the class?

6 MS. RUBENSTEIN: Well, there'll be members of class
7 but all of these members will have individual claims that they
8 could pursue.

9 THE COURT: Not if there's a class action.

10 MS. RUBENSTEIN: If there's a class action then the
11 individuals --

12 THE COURT: Let me be clear and I'm sorry to interrupt
13 you. And I don't want to start on the wrong foot with a new
14 lawyer, something to the rules of -- if you want to go survey
15 the world and search for plaintiffs to be actual named
16 plaintiffs that's one thing. And either they'll join or they
17 won't and either they'll be allowed to appear or they won't.
18 If this is a class action you've got 33 named plaintiffs or
19 opt-ins but my understanding of a class action is there is
20 either a common practice that applied to the class and then
21 there might be some separate issues as to an individual
22 person's damages handled by a proof of claim form or by a
23 formula you work for X years and we'll give you however many
24 dollars per year, whatever, but there aren't going to be any
25 new plaintiffs after the very near future.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 MS. RUBENSTEIN: But is the issue that your Honor is
2 suggesting that could we use predictive coding.

3 THE COURT: Forget predictive coding. I want to get
4 this case organized so that we do discovery twice. We've
5 already half done it once but I want to do it once from here on
6 out, not two to three times.

7 MS. RUBENSTEIN: But if I understand the Court's
8 position you are, I think we're saying maybe similar things
9 but, of course, you are saying it better than I can say it.
10 But you want to avoid having to go through this whole episode
11 again. And what we are trying to do is anticipate what the
12 prospective class claims are going to be and therefore trial to
13 deal with those now, is that correct?

14 THE COURT: Yes. But the problem is this, is a class
15 has not been certified and you are doing what often is the case
16 which is you want your cake and eat is too. You don't want to
17 move for class certification but you want discovery as if class
18 has been certified, including all the bells and whistles and
19 that's not going to happen unless you pay for it all and even
20 then I am not sure I'll let it happen.

21 MS. RUBENSTEIN: Well, we haven't had bifurcated
22 discovery.

23 THE COURT: Well, that's what I am suggesting and your
24 colleagues who have been here from day one may recall that
25 virtually the first two conferences when I inherited this case

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 on referral from Judge Sullivan, the original district judge, I
2 said I don't have in your scheduling order a requirement to
3 move for opt-in collective action status or for class action
4 status until after the close of discovery and that makes no
5 sense. And the argument was sort of well, we convinced Judge
6 Sullivan of that. Leave us alone. And I did for a while and
7 then insisted that you do the collective action motion and lo
8 and behold you won which you know. So the question is, can you
9 either move for class certification immediately or what minimal
10 discovery. You do need to move for class certification but I
11 am not going to give you full class action discovery as if the
12 class were certified, nor am I going to allow you to use this
13 current scheduling order as a way to do it twice. Once. Now
14 you know and then come back another time and say you want more
15 because you've gotten class certification, if indeed, you get
16 it.

17 MS. RUBENSTEIN: Before I respond, your Honor, and I
18 know you don't like tag-teaming but because I wasn't there at
19 the hearing with Judge Sullivan, I'd like to just refer to you
20 my colleague because my understanding is that the plaintiffs
21 did ask for bifurcation.

22 MS. NURHUSSEIN: If I could just interject very
23 briefly and to clarify a couple of points. Since the very
24 beginning of the case plaintiff's position has been that the
25 most efficient way to pursue discovery in this case would be to

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 work within a bifurcated schedule because we agree with you
2 it's a little bit nonsensical to have a class cert deadline
3 then no discovery period following that. So that puts us in a
4 very difficult position because in order to file our class
5 certificate motion we need class discovery including anecdotal
6 evidence.

7 THE COURT: But that's merits discovery too. The
8 problem I have with your bifurcation and I believe we talked
9 about this at, probably, the second conference is that what you
10 are saying you want for quote/unquote limited class action
11 discovery, exactly the same material or maybe 90 percent of
12 what you are asking for any way which in that case makes no
13 sense to bifurcate because, again, we're doing it twice. If
14 there were the argument that what you need is policy documents
15 from the company and a 30(B)(6) composition and then you are
16 prepared to move for class certification, we could then hold
17 off on all the predictive coding until that motion was decided.
18 If what you are asking for is 50 to 90 percent of what you're
19 asking for any way, then it makes no sense to do it that way
20 because, again, it's going to cause whether you use predictive
21 code coding or key words or monkeys it's going to cause to you
22 do it two to three times anyway. So what would you need to
23 revisit that bifurcated discovery besides everything?

24 MS. NURHUSSEIN: I probably want to confer with my
25 colleagues about this. I wouldn't agree what we're seeking is

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 everything. I think a couple of conferences that my colleagues
2 did identify a few categories of documents and, perhaps, we can
3 try to identify additional ones.

4 THE COURT: That's backwards. What I want is either
5 very limited discovery without necessarily predictive coding,
6 mostly core key operating manual type things, whatever and a
7 30(B)(6) deposition and you've got your witnesses and then we
8 have class certification. Then Judge Carter will decide that
9 one way or the other and then the 26 opt-ins will, if there's
10 no class certification, assert their own claims or they
11 won't -- either there'll be class certification, then we can do
12 it right but if we're back to where we were previously and I
13 haven't looked at that transcript in a long time but,
14 basically, you are saying you want three quarters of what we're
15 doing now for a class motion and I am happy to defer this and
16 let you all come back in a week or to two or whatever it takes
17 to see if you all can work it out. Now that I am seeing from
18 the letters at least some more cooperation but I can't see
19 spending the money to do predictive coding whether I accept all
20 of your proposals or their proposals or mix and match or send
21 you to a master and any of that, I can't see doing of that only
22 to have you then say. And now we want either the 26 or we want
23 class discovery for everybody because we now have got a class
24 certified after the close of all other discovery. It doesn't
25 make sense. So I am willing to hear from the defendants since

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 this is probably catching all of you equally by surprise.

2 MS. CHAVEZ: Your Honor, thank you. All our
3 recollection of the history here is probably the same as yours
4 which is that we were looking for discovery to go forward on
5 both, on all issues because the plaintiffs in identifying the
6 common policy or practice were articulating a scope of
7 discovery for class certification that was almost as broad as
8 all discovery. And you've heard us say this before but part of
9 the, I think, the nub of the problem is that the common policy
10 or practice isn't particularly articulated. The centralized
11 decision makes notion the reorganization motion are both very,
12 very broad and they have been interpreted by the plaintiffs in
13 this, in the scope of discovery as kind of reaching everything.
14 So that's been why we have been looking to have discovery
15 proceed in this way but if discovery could proceed on a more
16 limited basis, focused narrowly on a common policy or practice,
17 we would be more than happy to consider that as a way of moving
18 things forward more expeditiously.

19 THE COURT: OK. Anything else from the plaintiffs or?

20 MS. RUBENSTEIN: In regard, your Honor?

21 THE COURT: Yes.

22 MS. RUBENSTEIN: I mean, no, I would be -- perhaps you
23 can take a break or we can meet and confer further. I can meet
24 with co-defense counsel. We can discuss an alternative
25 approach. I don't think that we've ever sought full and

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 complete discovery.

2 THE COURT: Not full, just like three quarters.

3 MS. RUBENSTEIN: But again the interest has been to
4 try to avoid, I think, the we anticipated there would be
5 additional claims opt-ins and people. Anyway I have no problem
6 with that and we'll be pleased to meet and confer and get back
7 to the Court when ever you suggest.

8 THE COURT: All right. In light of that I am,
9 frankly, not sure it makes too much sense to go through the
10 side issues. I do want to note for the record in light of the
11 history of this case that Mr. Lewis and I have been at least
12 one for sure and I think two or three E-Discovery programs
13 together. I know we were at -- I am sorry -- Dr. Lewis. I
14 know we were at the Cardinal Valley Conference this past summer
15 and had either back to back panels or something like that but I
16 can't say I have any memory of meeting Mr. Forrest. That may
17 be because I didn't or it may be because my memory isn't that
18 great but I did want that on the record in light of the history
19 of this case.

20 MS. CHAVEZ: Your Honor, on that point we would ask
21 the plaintiffs to state whether they have any objection to you
22 proceeding on this case in light of what you've just disclosed.
23 We'd just like to clarify that so there aren't any problems
24 later.

25 THE COURT: Normally I wouldn't ask for that but I
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 think in light of the history of this case both of you should
2 state your opinion now and then we can go to motion practice if
3 need be which, hopefully, we don't.

4 MS. RUBENSTEIN: Well, I don't have any objection.

5 MS. CHAVEZ: We don't have any objection on that basis
6 to Mr. Lewis' involvement.

7 THE COURT: Good. One other point to throw out there.
8 To the extent plaintiff's recusal papers were commenting that
9 there is this core E-Discovery industry and I'm too friendly
10 with some people in it, all I would say is I suspect that Dr.
11 Lewis is a big part of that industry as well. I more than
12 suspect it. And I only bring that up because if we're going to
13 a special master here, the only way I would do it is if
14 Dr. Lewis and Recomind or whoever has to make the decisions but
15 with those input can come up with somebody that both sides
16 respect and are willing to do some of that on a non appealable
17 basis. That may be of no interest to anybody and I am not
18 trying to put Dr. Lewis or anybody on the spot. Obviously, I
19 think he knows some of the people who would be good special
20 masters but as defendant said in their letter. If we're only
21 going to build in three levels of review so that the special
22 master does something which is then reviewable by me which is
23 then reviewable by Judge Carter it's only adding more expense.
24 So if we're going to go the special master route and I think
25 there are some technical issues here with sampling and the like

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 where a master might be helpful but I don't want it to be
2 adding levels of expectancy. So you can all think about that
3 as well. No one has to answer now.

4 As to the rest of this, I mean I've gone through the
5 letters. I could do more with you, you know on the one and you
6 are all here on the other. It may get mooted depending on what
7 you're going to do with the class issue and the 26 opt-ins,
8 etc., so I am inclined to say we can defer that until you come
9 back. But if there's one particular thing or something really
10 crucial that you think would be helpful I can give you rulings
11 or nonbinding thoughts so you don't feel you've come here and
12 brought experts at the expense from Chicago and just being told
13 go away, come back in a week or two.

14 MS. RUBENSTEIN: Your Honor, would it be possible to
15 take a five to ten minute break to discuss a couple of your
16 suggestions --

17 THE COURT: Sure.

18 MS. RUBENSTEIN: -- see how we can best make sure of
19 our experts being here?

20 THE COURT: OK. What do you want, ten minutes?

21 MS. RUBENSTEIN: That would be great.

22 THE COURT: Off the record.

23 Recess)

24 THE COURT: Be seated.

25 All right. Now that you have had about 30 or 40

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 minutes, have you been able to reach any --

2 MS. RUBENSTEIN: Time flies when you enjoy yourself.
3 Your Honor, we decided that we would like to reconvene at the
4 Court's convenience so we can all, perhaps, discuss this
5 together. I would like to talk this over with defense counsel.
6 I would like to talk further with my colleagues to determine a
7 way in which we can come to some agreement perhaps and not take
8 up any more of this Court's time. However, when the Court
9 schedules the next conference I am just wondering if you could
10 let us know if we should bring Dr. Lewis and Mr. Forrest along
11 with us if you contemplate wanting to hear any information
12 about protocol or any discussion about it. I mean, we brought
13 them with us today because my understanding of your directive
14 is that you would want to discuss changes to the protocol in
15 light of the 26 opt-ins.

16 THE COURT: Correct. And I must say, by the time all
17 your papers came in and things had been busy, I was reading
18 your letters at 8 o'clock this morning which is why I didn't
19 say, don't bring Dr. Lewis because we're going to talk about
20 class issues. I didn't focus on that until it jumped off the
21 page of your letter even though you sent it in late Friday
22 night.

23 MS. RUBENSTEIN: Sorry about that, your Honor. I take
24 full responsibility for that.

25 THE COURT: It's your money being paid for Dr. Lewis,
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 so that's OK. But, yeah, I would have given you warning had I
2 had a chance to read your papers beforehand but believe it or
3 not, you are not my only case and there are other things that
4 keep me busy all the time.

5 MS. RUBENSTEIN: Do you anticipate though hearing or
6 expecting to hear information or having a discussion about the
7 proposed protocol?

8 THE COURT: I mean it depends. Frankly, I have no
9 interest in going forward with predicative coding until we
10 figure out what you are going to do on class action. If the
11 answer is, you know, the existing proposals on the protocol
12 will suffice and there will be no requests for class related
13 discovery, if the class is certified, you know, in six months
14 or whatever your schedule calls for then we'll deal with the
15 protocol. If we're dealing with how to get a handle finally on
16 the limited amount of discovery necessary for an initial class
17 action determination, then we're probably not going to be
18 talking protocol because we are not doing two rounds of
19 predicative coding one for class and another for the
20 quote/unquote merits.

21 So I mean, seriously, if there are policies that are
22 applicable, sufficiently applicable to make all the people who
23 worked in a certain position at MSL to make that a class or a
24 group of subclasses or whatever, that's probably not going to
25 be based on anecdotal evidence per se as much as some sort of

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 uniform policy the company. If you have to prove it by
2 anecdotal, figure out how to take ten depositions without
3 documents or whatever it's going to be, I don't know. You're
4 paid the big money to figure out on both sides here how you
5 want to prove your case but it has frustrated me from day one
6 in this letter, really brought it again to the fore. We can't
7 economically do this two to three times, so you need to figure
8 out how to do enough. This is like Goldilocks, not too little,
9 not too much but just the right amount of cost effective
10 discovery to make a class action motion or determine that the
11 discovery you are doing on, quote/unquote, merits discovery
12 will give you enough information that if a class is certified
13 you don't need anything else except the possibility of proof of
14 claim forms or that sort of individualized damage determination
15 if there turns out to be a uniform policy that discriminated
16 against women in one or more of the ways that you allege they
17 were.

18 So when do you all think you'll be ready to come back?

19 MS. CHAVEZ: Your Honor, I just wanted to say on the
20 point about conferring over the next couple of weeks because I
21 think all of us want to move this forward as much as possible.
22 It would be helpful for the common policy or practice that's
23 being alleged here to be articulated and we have gone through
24 this.

25 THE COURT: You are all going to -- this, frankly,
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 goes to both sides. You are going to sit down and try
2 something really novel which is, both sides are going to
3 cooperate with each other, OK. And we have been through this
4 repeatedly in terms of you saying there was no common policy.
5 There was no core group, etc., and then them saying the
6 contrary. That's sort of the merits. You all are going to
7 figure out strictly from a procedural process whether you are
8 doing one shot complete discovery or whether you are doing some
9 class discovery and then we'll do predictive coding down the
10 road. We are not doing it twice. That, I am telling you that
11 now. We're not doing it twice.

12 The other thing, I am not sure I want to wait till
13 December 15th or thereabouts but do you have a December 14
14 conference before Judge Carter which I believe -- tell me if I
15 am looking at things correctly -- is dealing with the issue of
16 the six people who you want to knock out. So that will avoid
17 the fight that you are having in these letters about are they
18 in or are they out. Even if we do our conference before then
19 you know that issue will probably fall out before you have to
20 do very much more in the way of ESI protocols for predictive
21 coding assuming you are not coming back till after
22 Thanksgiving, etc.

23 MS. CHAVEZ: Your Honor, the conference on the 14th is
24 our pre-motion conference, so it may be that's a preliminary
25 filing motion. I don't know.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 THE COURT: Neither do I.

2 MS. RUBENSTEIN: Your Honor, the only issue that we
3 would raise at this point, the final issue that is, and I don't
4 know if the Court would be interested in entertaining this is
5 the Sircanus hard drive issue which was the subject I believe
6 that's been fully briefed and the Court did not request a
7 pre-conference -- I mean a hearing on that but that is a
8 matter --

9 THE COURT: I, frankly, thought based on defendant's
10 response that the issue was largely moot and was going to be
11 resolved when you deposed him. But if you think there is
12 something worth further talking about I am not giving you
13 massive relieve of everything they did to --

14 MS. RUBENSTEIN: I am not asking that, your Honor. I
15 just want to make sure that the Court understands that the guy
16 was a central decision maker and is right there on the
17 forefront of the case and he actually, personally, terminated
18 the women and made discriminatory comments. He claims his hard
19 drive is completely crashed and corrupted and this was going
20 back more than a year ago and there have been subsequent --

21 THE COURT: But with what relief?

22 MS. RUBENSTEIN: What's of concern to me, your Honor,
23 is the continuing shifting and changing responses about whether
24 they've captured data, whether it's report, whether they have
25 access to the hard drive. All we're asking for -- and I don't

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 want to make a spoliation motion -- I don't want to go to Judge
2 Carter. I don't want to take up any more of your time. I am
3 looking at this as a straight up discovery issue where the guy
4 who is the central person in our case claims to have blown up
5 his hard drive, when we heard that he didn't blow up his hard
6 drive. Then we heard from the defendants -- and I don't mean
7 to ruin the honeymoon but it's important that this is why I am
8 raising it in this courtroom right now because we had asked for
9 the information. They said, please propound instead of doing
10 this informally, please propound discovery and ask for the
11 information you want. And my colleague did, in fact, do that,
12 propounded six very succinct, very direct, nothing cute,
13 nothing out of the box, very succinct interrogatory saying
14 please give us the information that we need to determine
15 whether or not there could be spoliation, what the reason is
16 for this purported hard drive crash and why we are getting
17 various responses. They proceeded to object. And this is a
18 gamesmanship that I don't understand. They objected to every
19 single legitimate interrogatory.

20 So then it wasn't until we had to bring you into it,
21 bring the Court into it that we finally got additional
22 explanations. Well, we were able to capture some documents.
23 We weren't able to capture others and I don't want to say
24 anything that would mischaracterize the record but that's
25 essentially it and I really think that all we want at this

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 point is to have a forensic analyst go in there and to look at
2 it to determine the reason why we're getting very shifting
3 responses. And this is a very important guy. If it wasn't --

4 THE COURT: Stop. Stop. Stop.

5 MS. RUBENSTEIN: And it begs the question --

6 THE COURT: Counsel. Counsel. Thank you.

7 MS. RUBENSTEIN: OK. Sorry.

8 THE COURT: Look, it seems to me -- and I am looking
9 at the August 31 response letter from Mr. Anders -- that it was
10 a hard drive crash. That is not a violation of the
11 preservation duty, assuming that it was a legitimate crash. In
12 other words, it is perfectly appropriate under Zubulake and a
13 pension committee and all the other cases on the need to
14 preserve that you put the hard drive in a closet somewhere.

15 Now, whether they really put the hard drive in the
16 closet but what you are sort of saying assuming that what we're
17 representing in this letter is correct and we will get to prove
18 that in a minute is that somehow they should have made multiple
19 duplicates of everybody's hard drive that they were preserving
20 in case of a hard drive failure.

21 So as I read what they say. They preserved the hard
22 drive. It crashed. They then tried to get material off of it
23 and wound up sending it out to BIA to analyze the hard drive.
24 Now, I suppose that if you think BIA is not capable or
25 something and you want to spend the money to hire an

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 independent expert to take that hard drive and see what can be
2 gotten off of it, what can be gotten off of it will then be
3 turned over to defense counsel for review, for relevance and
4 privilege, all of which will be at plaintiff's expense, I will
5 consider that request. I think it's, frankly, a waste of
6 money, particularly, until you depose Mr. Tsokanos,
7 T-s-o-k-a-n-o-s, but I will consider that if that is the relief
8 you are it asking for now.

9 MS. RUBENSTEIN: That is the relief we're going for
10 now, your Honor, and if I may the E-Discovery protocol that's
11 entered by the court but hard drives, laptops and desktops as a
12 phase two area of discovery which is a point that we are not
13 even at yet.

14 THE COURT: I understand. If an effort to -- whether
15 we're at phase two or whether we'll ever get to phase two
16 Sircanus is important. You have said -- and I take what
17 lawyers say as officers of the court seriously in terms of
18 factual representations. I may distrust some of what they try
19 to tell me in technical areas but you told me, you know,
20 failed, there's a hard drive failure, good faith. You spent a
21 lot of money that you probably didn't need to sending it to
22 BIA. I assume that they have returned that hard drive to you
23 or they're holding it somewhere and that somebody else can look
24 at it, right?

25 MR. ANDERS: Yeah. We still have access to the hard
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 drive.

2 THE COURT: Do you have any objection however
3 irrelevant it may be in terms of timing -- and by irrelevant I
4 just mean it may be earlier than it would otherwise come
5 up -- to put an end to this and, perhaps, get you all being
6 less suspicious of each other. Any objection to them
7 designating a reputable company or forensic examiner, give him
8 the hard drive or her or it? They will pay for it, whatever
9 comes off it that's beyond what you've already been able
10 through BIA to pull off it of it will be shown to you and
11 you'll then give the other side the relevant material and
12 whatever is not relevant you will do the equivalent of a
13 privilege log or you'll just put in another pile and if they
14 then don't trust that we'll worry about what do with that at a
15 later point?

16 MR. ANDERS: I guess, your Honor, if I may, as an
17 interim step we provide you with the report that we obtained.
18 The issue now of whether or not the crash legitimately or not
19 or whether somebody can pull off additional information?

20 THE COURT: Probably both.

21 MR. ANDERS: Cause it sounds like we are at a point
22 where we're doing discovery now from the source.

23 THE COURT: Whatever. I mean, look, seems to me
24 they're suspicious, perhaps, because it's their nature,
25 perhaps, because he is the president of MSL that lo and behold

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 his computer crashed. You've certainly all seen plenty of
2 cases in which computers were crashed, wiped, evidence
3 eliminated or run over it, any of that one. Could say that
4 you've got to wait and take Mr. Sircanus's deposition. If you
5 want to give them the report that BIA gave you and see if that
6 satisfies them, I am trying on this to lower the temperature
7 between the two sides, start you down a road of further
8 cooperation and doing it at zero costs or close to zero cost to
9 you. You want to give them the BIA report in the first
10 instance and see if that satisfies them. We can then refer the
11 next step till later. You want to give them access to the hard
12 drive but then there will be a forensic examiner that they
13 choose but that is acceptable to you?

14 MR. ANDERS: Your Honor, I would suggest giving them
15 the report first, letting them review what the results of the
16 report were and then deciding if they want to go through the
17 expense of finding their own expert.

18 THE COURT: Does that work?

19 MS. RUBENSTEIN: I think that's fine. I am not able
20 as a lawyer to assess just to look at a report from --

21 THE COURT: Well, assume either Mr. Lewis will look at
22 the report if that's within his area or Dr. Forrest if that's
23 within his area of expertise. Or if it's not, I assume that
24 whoever you would be hiring to look at their hard drive will
25 charge you a lot less to look at the BIA report and say is that

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 reasonable than to actually redo what BIA did. And then if you
2 still want access to the hard drive, you know we'll see where
3 we go on that. I am meaning to giving it to you if you need it
4 but I would really like you to use your money in its most
5 efficient way.

6 MS. RUBENSTEIN: We're trying to use this Court maybe
7 hence forth in a more efficient way and to not come to you and
8 that's why we just want the opportunity in the event we don't
9 believe the report is dispositive to have the full opportunity
10 in the event our experts believe --

11 THE COURT: All you need to do is put it on an agenda.
12 You don't need to brief it. We can talk about it.

13 MS. CHAVEZ: Or, your Honor, the parties could also
14 confer about that before bringing it to the Court.

15 THE COURT: Oh, my God. You two want to talk to each
16 other? I am shocked. There's gambling going on.

17 OK. When do you want to come back, folks? How long
18 do you think you are going to need to arm wrestle over whatever
19 you are going to be doing?

20 MS. CHAVEZ: Your Honor, if you are available on the
21 14th we'll be here with Judge Carter that day anyway. That
22 would give us from our perspective any way sufficient time to
23 confer.

24 THE COURT: Well --

25 MS. RUBENSTEIN: It's fine with us. I just would like
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 to get an idea from the Court as to whether or not you would
2 entertain any testimony or questions or answers from our
3 experts because I'd like to then talk with them.

4 THE COURT: What you are going to need do in order for
5 that to occur is letter write in advance if we're going forward
6 with some version of an ESI protocol meaning, you've decided
7 you are not going to do any further class action discovery
8 other than whatever I decide you are entitled to under the
9 current process. The other thing that if you are going that
10 route, if the new 26 opt-ins are going to bring Title VII
11 claims as co-plaintiffs for the class, whatever, then you are
12 going to have to amend the complaint. I am not doing it with a
13 maybe. So either they're part of the class and don't have an
14 individual Title VII claim and then we treat it as the class or
15 they have an individual Title VII claim and if so now is the
16 time to decide that. So if all of that is done before December
17 14th we'll deal with whatever we need to deal with.

18 What time is your conference in front of Judge Carter?

19 MS. CHAVEZ: Your Honor, we don't remember.

20 MS. BAINS: I believe it's at 9:30.

21 THE COURT: It is at 9:30. Back row wins the prize.
22 So how long -- you know I don't want to say 10:00/10:30 and
23 then you are stuck up there and my morning goes to hell in a
24 handbasket. You want to do it at two o'clock? You want to do
25 it at 11 and it'd better be done?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC

Conference

1 MR. BRECHER: I think 11, your Honor, fine by us.

2 THE COURT: OK. I guess the question is without
3 repeating everything in a nice free and stack of material
4 you've already given me what I am going to need to know in
5 advance is whether we are going to be talking ESI protocol or
6 whether we're still bogged down on the threshold question of
7 class type issues. If we are doing the ESI protocol I would
8 probably want Dr. Lewis to be here and his counterpart from
9 Recomind or whatever. If we're not doing that then he doesn't
10 have to be here.

11 And I need you all to get me that information in a
12 timely manner, not as part of a six inch stack which therefore
13 doesn't necessarily get read when there are other crises going
14 on and then I'll let you know otherwise. All I can say is you
15 are all burning money like it's going out of style. Have your
16 experts here and it may be meaningless and it may be
17 meaningful. But if you give me enough advance notice meaning,
18 at least a week in advance, then probably a week in advance Dr.
19 Lewis and I will be in the same place.

20 For the record, for the rest of you that the
21 Georgetown E-Discovery Conference.

22 The sooner you let me know what you're planning on
23 doing, the sooner I can deal with that. So that's all I can
24 tell you now.

25 MS. CHAVEZ: Judge, so you'd like to hear from us by
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 December 7th then as to what we would expect, request the Court
2 to.

3 THE COURT: Yes. All it really needs to be is sort of
4 like an agenda list and whether you think we're going to get to
5 the ESI protocol question or not. Obviously, somewhere in
6 advance of the 14th any new information you each want me to
7 consider without going to multiple stacks of detachments and
8 all that, get in to me because I do prepare for conferences,
9 OK.

10 MS. RUBENSTEIN: We did not get a date. I just would
11 expect for the defendants to turnover the reports.

12 THE COURT: Monday after Thanksgiving.

13 MR. ANDERS: I can get it to them next week. It just
14 has to be put in final form. I just don't know the BIA
15 schedule. I should be able to get it to you by the end of next
16 week.

17 THE COURT: If not whatever you've got, even if it's a
18 draft, give it to them.

19 MR. ANDERS: It'll be fine.

20 THE COURT: Tuesday of next week. Certainly sooner if
21 possible.

22 All right. Usual drill. You all need to buy the
23 transcript from the reporter. Certainly, don't have to remind
24 but the rules about objections but, hopefully, we're not taking
25 any today and I'll see you on the 14th.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

CBKAAMOOC Conference

1 MS. RUBENSTEIN: Thank you very much, your Honor.
2 Have a nice Thanksgiving.
3 THE COURT: Same to you all.
4 (Adjourned)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

